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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF OREGON

11 KWAI FUN WONG,  
 12 WU-WEI TIEN TAO ASSOCIATION  
 13 and CHONG HUA SHENG MU GONG,

Civil No. 01-718-ST

Plaintiffs,

PLAINTIFFS' MEMORANDUM  
 RE: ADJUSTMENT OF STATUS

vs.

15 DAVID BEEBE, JERRY F. GARCIA,  
 16 JACK O'BRIEN, DOUGLAS GLOVER,  
 17 JOHN DOES INS OFFICIALS and  
 18 UNITED STATES OF AMERICA,

Defendants.

INTRODUCTION

On November 5, 2001, the parties appeared before the court for oral argument on Defendant's Motion to Dismiss. During that hearing, the court requested clarification on the issue of adjustment of status issue. Plaintiff's clarification follows.

**A. Wong's Eligibility for Adjustment of Status under 245(i)**

8 USC 1255 or INA 245 allows a nonimmigrant to adjust his or her status to that of a person admitted for permanent residence. Pursuant to 245(i) an alien who is physically present in the United States who entered the United States without inspection and had filed a petition for

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1 classification of adjustment of status under 8 USC 1154 on or before January 14, 1998 is eligible  
 2 to apply for an adjustment of status. Wong had previously filed a petition for immigrant status as  
 3 a special immigrant minister pursuant to 8 USC 1154(a)(1)(G)(ii).

4       Becoming a special immigrant under the ministerial provisions requires a two step  
 5 process. First the religious organization for which an individual ministers must file a petition  
 6 requesting the individual be granted immigrant status. In that petition, the religious organization  
 7 must show that they are a "bona fide organization which is affiliated with the religious  
 8 denomination and is exempt from taxation." 8 USCS 1101(a)(27)(C)(ii)(III). After the  
 9 organization's petition is approved, the individual applying for immigrant status must fill out  
 10 additional forms to show that they are, in fact, a minister of the organization and have been  
 11 carrying out such a vocation continually for at least two years immediately preceding the time of  
 12 application for admission. 8 USCS 1101(a)(27)(C)(i)& (iii). Plaintiff Wu Wei Tien Tao  
 13 Association's petition was granted on November 9, 1992. Plaintiff Wong filed her petition for  
 14 special immigrant status and had a petition pending from 1995, well before January 14, 1998.  
 15 Therefore, plaintiff Wong was entitled to apply for an adjustment of status under INA 245(i) and  
 16 the INS Nebraska office admitted as much by accepting her application.<sup>1 2</sup>

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23       <sup>1</sup> Under OI 245.2(a), an application for adjustment of status will be reviewed to  
 24 determine whether it was properly filed and whether prima facie eligibility has been established.  
 If prima facie eligibility is not established, the application shall be rejected.

25       <sup>2</sup> Defendant Beebe eventually denied Plaintiff Wong's adjustment of status application  
 26 because he claimed she was ineligible under 245(a) or (c). The fact she was eligible for an  
 adjustment of status under 245(i) was completely ignored by Defendant Beebe.

**B. Rights Of An Individual Filing For Adjustment Of Status.**

Once an applicant files for an adjustment of status and that application is accepted, the applicant has the right to have that application adjudicated. Upon receipt of the application and the filing fee, the Attorney General may adjust the status of the alien to that of a permanent resident if the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residency, and an immigrant visa is immediately available for the alien at the time the application is filed. 8 USC 1255(i)(2)(A) & (B). While the term “may” implies a discretionary element, the statute does not delineate when the Attorney General can exercise his or her discretion to deny an application. In addition, if discretion were exercised based on factors which were discriminatory, such as race or religion, a cause of action could exist for violations of the applicant’s constitutional rights.<sup>3</sup>

It is plaintiffs’ contention that Plaintiff Wong’s application for adjustment of status needed to be ruled upon before Plaintiff Wong was subject to expedited removal. The filing of the application for adjustment of status took her out of the scope of the expedited removal statute. She was no longer “an arriving alien,” if she ever was one.<sup>4</sup> She became a permanent resident applicant and was, therefore, not subject to expedited removal. Issuance of an expedited removal order when application still pending is action outside of defendant’s statutory authority - INS is only authorized to apply expedited removal to arriving aliens, not to applicants for permanent residency.<sup>5</sup>

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<sup>3</sup> A review of the transcript from November 5, 2001, will indicate that defense counsel conceded this at oral argument.

<sup>4</sup> Plaintiffs deny that Wong was an “arriving alien” because her absence was brief, casual and innocent and under the Fleuti doctrine, it was as if she never left the country.

<sup>5</sup> Moreover, if plaintiffs were allowed to proceed with discovery, the documents received may reveal policies and procedures supportive of plaintiffs’ arguments.

1 Expedited removal is only intended to apply to those aliens who *indisputably* have no  
 2 authorization to be in the United States. Wong did have authorization to be here. She had lived  
 3 in the United States since 1992, she had an adjustment of status application pending, and she had  
 4 prior applications for special immigrant status and the organization's initial approval as a bona  
 5 fide religious group. In addition, when she returned from her emergency trip to Hong Kong, she  
 6 had a valid visitor visa, which allowed her entry into the United States.<sup>6</sup> Plaintiff's authorization  
 7 to be in the country is far from undisputable.

### 8 **C. Rights If 245(i) Application Is Denied**

9 Ordinarily, when Plaintiff Wong's application for adjustment of status was denied, she  
 10 could have moved to have her denial reopened or reconsidered under 8 CFR 103.5(a) within 30  
 11 days of the denial. Under the motion to reconsider, the official may reopen the proceeding or  
 12 reconsider the prior decision. In the motion to reconsider, she could have used precedent to  
 13 support her decision and argue that the decision was based on incorrect application of law or  
 14 service policy, or that the decision was incorrect based on the evidence of the record at the time  
 15 of the decision. 8 CFR 103.5(a)(3) Thereafter, Wong could have appealed the denial of the  
 16 motion to reconsider to the Administrative Appeals Unit.

17 Plaintiff Wong had also filed for an adjustment of status to a permanent resident alien  
 18 under the special immigrant status - minister provisions. 8 CFR 3.1(b) gives appellate  
 19 jurisdiction to the Board of Immigration Appeals ("BIA") for denials of petitions for immigrant  
 20 status. Whether or not she was a qualified minister under 8 USC 101(a)(27)(C)(i) would have  
 21 been a decision that gave Wong the right to appeal her case to the BIA. Defendant Beebe did not  
 22 notify her of the appellate jurisdiction nor did he furnish the appropriate appeal form under 8  
 23 CFR 103.3(iii). Instead, Defendant Beebe stated that his decision not to adjust Wong's status is

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25 <sup>6</sup> Plaintiff Wong had an unrestricted, multiple entry, visitor visa (B1- business/B2-  
 26 pleasure) when she entered the country on April 13, 1999. Her visa was valid indefinitely. She  
 had documents to enter the country.

1 not subject to review because of the expedited removal order. Nowhere in the expedited removal  
2 statutes or regulations does it state that an applicant for adjustment of status will lose their appeal  
3 rights if the INS issues an order of expedited removal or that expedited removal trumps all other  
4 immigration law. By denying Plaintiff Wong of her appeal rights and right of review, Defendant  
5 Beebe acted outside the scope of his authority. In addition, Defendant Beebe (and Defendant  
6 Garcia) abused their authority by stating she was not entitled to review, when the denial was, in  
7 fact, subject to review. The expedited removal statute does not eliminate any other rights of due  
8 process that Plaintiff Wong had.

#### 9 D. CONCLUSION

10 Because Plaintiff Wong was denied her right to review and defendants acted outside the  
11 scope of their authority, plaintiffs should be allowed to proceed with their claims against  
12 defendants in this action.

13 DATED this 13th day of December 2001.

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16 TOM STEENSON  
17 BETH CREIGHTON  
18 Of Attorneys for Plaintiffs  
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**CERTIFICATE OF SERVICE**

I hereby certify that I telefaxed (202 / 616-9366) and mailed a true copy of the foregoing memorandum to Christine A. Bither, attorney for defendants, addressed to her Washington, D.C., office address on this date.

DATED this 13th day of December 2001.

  
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BETH CREIGHTON  
Of Attorneys for Plaintiffs